

State of Michigan

In the Supreme Court

Appeal from the Court of Appeals
Neff, P.J. and O'Connell and R. J. Danhof, JJ

Tony J. Daniel,

Docket No. 120460

Plaintiff-Appellee,

COA Docket No. 224423

v.

WCAC Docket No. 99-0063

State of Michigan
(Department of Corrections),

Defendant-Appellant.

Brief on Appeal – Appellant

ORAL ARGUMENT REQUESTED

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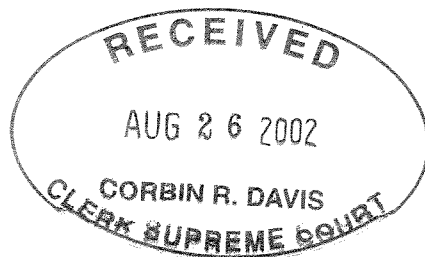
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August 26, 2002 (DANIEL,T4SCTLVGRD'02)

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STATEMENT OF QUESTION INVOLVED

MCL 418.305 of the Workers' Disability Compensation Act provides that an employee "shall not receive compensation" if he is "injured by reason of his intentional and wilful misconduct."

Should probation officer Tony Daniel receive workers' disability compensation benefits because the natural stresses resulting from the allegations, investigation, hearings, imposition of a disciplinary penalty, and unsuccessful grievance proceedings, "by reason of" his sexual harassment of female attorneys, contrary to Civil Service and Department of Corrections rules, led to a temporary mental disability?

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

A. THE HEARING.

On August 30, 1994, in his 34th year of life,¹ and near his 10th year of work as a State probation officer,² Tony Daniel³ approached Assistant County Public Defender Gayle Brennan outside the courtroom of Circuit Judge Leiber in Grand Rapids, and, as testified to by Public Defendant Brennan, said to Public Defender Brennan,

“do you want to f**k.”⁴

On pages 13 to 14 of his December 17, 2001 response brief, Mr. Daniel argued that this and other language was merely “sexual banter in the workplace,” “words that hold little if any effect when uttered,” “[o]ne would expect a pat on the rump or much worse would be the basis for these allegations.”

After being rebuffed by Public Defender Brennan, Mr. Daniel said,

“Well I do have a wife and two kids.” “We would have to be discreet.”⁵

Then, on the same day, in a courtroom during a parole violation hearing, Tony Daniel wrote a note to Public Defender Brennan indicating that she would have to lose ten pounds.⁶

“[I]n the middle of our on-record discussion with the judge, at that point Mr. Daniel slipped a small piece of paper over to me that said you would have to lose ten pounds, and pulled it back while we were on the record.”⁷

¹ Born March 22, 1960.

² Began November 5, 1984. Mr. Daniel has a 1982 BA in Sociology from Albion College. (TR 38).

³ There is no record of any pre-employment mental disability of Mr. Daniel.

⁴ TR 419. This language was cited by the Court of Appeals majority. 248 Mich App at 97; 638 NW2d at 177 (App 33a).

⁵ TR 419. 248 Mich App at 97; 638 NW2d at 177 (App 33a).

⁶ TR 449-450; Pl exh 5, item “4.”

⁷ TR 419-420.

Public Defender Brennan thought having her contacts with Mr. Daniel limited would be sufficient, that is why she did not make a report at that time.

"I felt I had explained to Mr. Daniel that I didn't want to have anything to do with him, that he was not to approach me in that manner again. And I spoke to my supervisor about limiting any contact I had with Mr. Daniel, and I felt that was sufficient at that point in time. . . . I felt that I had dealt with it sufficiently and that it would stop, or that it wouldn't continue."⁸

Mr. Daniel, testified Public Defender Brennan, refused to take "no" for an answer.

"I tend not to be offended by strong language. What was especially offensive about this particular incident was that Mr. Daniel refused to take no for an answer. And even after I told him that I didn't want to have anything to do with him, he persisted . . . And all I wanted for him to do was to leave me alone. When I say no to somebody, that means no."⁹

At a parole hearing on February 10, 1995, concerning a parolee, Tony Daniel kept interrupting and interfering with Public Defender Brennan's contact with a client,¹⁰ then alluded to the August 1994 incident by telling Public Defender Brennan that she had to lose 20 pounds,¹¹ and saying to her, "[y]ou want me, you know you want me."¹²

In the summer of 1994, while Tony Daniel was in a judge's library with private attorney Judy Ostrander, he said to her that he was attracted to Caucasian women, asked attorney Ostrander if she had ever dated a Black man, and told her that he was turned on by women's thighs.¹³

On February 21, 1995, Jayne Price, Mr. Daniel's supervisor, received a phone call from a woman attorney complaining about Mr. Daniel.¹⁴

⁸ TR 416-417.

⁹ TR 426-427.

¹⁰ TR 418.

¹¹ TR 420, 464, 483, 484; Pl exh 5, item "4."

¹² TR 420.

¹³ Pl exh 5, item "9."

¹⁴ TR 248, 251, 294, 295.

On February 28, 1995, supervisor Price received a letter dated February 27, 1995¹⁵ from Assistant Public Defender Gayle Brennan complaining of Mr. Daniel's August 30, 1994 "discreet affair" comments, and his note about losing 10 pounds, plus his February 10, 1995 comment about losing 20 pounds.¹⁶

Supervisor Price, at the direction of her supervisor,¹⁷ told Mr. Daniel that she was conducting an investigation, apprised him of the allegations so far, said she would get back to him, and told him that he would have an opportunity to respond.¹⁸

On February 28, 1995, supervisor Price received a phone call from attorney Judy Ostrander concerning Mr. Daniel's conduct.¹⁹

Supervisor Price subsequently received phone calls from or contacted two other female attorney complainers, and also some witnesses.²⁰

On March 8, 1995 Public Defender Brennan advised that she had come forward at the time she did because Mr. Daniel did not understand "no."²¹

On March 9, 1995, attorney Judy Ostrander followed up her phone call to supervisor Price with a letter of complaint.²²

On March 24, 1995, supervisor Price received a March 23, 1995 letter from Assistant Public Defender Donald Pebley supporting some of Public Defender Brennan's allegations.²³

On April 11, 1995, supervisor Price met with attorney complainant Judy Ostrander.²⁴

¹⁵ Pl exh 5.

¹⁶ TR 253; Pl exh 5 "4."

¹⁷ TR 394, 254-255.

¹⁸ TR 283-284, 285, 286-287, 290.

¹⁹ TR 256.

²⁰ TR 257-260, 263, 264, 265, 382-383.

²¹ TR 404.

²² TR 266; Pl exh 5, "9."

²³ TR 267; Pl exh 5, "6."

²⁴ TR 261, 281; Pl exh 1, "10."

Mr. Daniel was given a set of questions by supervisor Price on approximately May 4, 1995, to which he replied on May 5, 1995, answering some peripheral questions, but in effect denying everything.²⁵ Supervisor Price was told by Mr. Daniel that the response was his complete response, that he had nothing he wanted to add, but, if he had anything to tell, he'd tell his attorney.²⁶

Supervisor Price talked with Mr. Daniel more than 5 times,²⁷ she wanted him to give her the names of witnesses who might support his position, but he did not.²⁸

As the investigation was going on, Mr. Daniel felt out of control and was afraid he would hurt somebody with the gun he was authorized to carry.²⁹

Supervisor Price's investigative report was submitted on May 31, 1995.³⁰

Supervisor Price's finding, based solely on written or verbal statements to her,³¹ was that Mr. Daniel appeared to be in violation of the Corrections Employee Handbook.³²

On Wednesday, June 14, 1995, a memo from Mr. Daniel's Area Manager to Mr. Daniel was delivered to and signed for by Mr. Daniel.³³ Five counts were detailed, with the "Range of Discipline" clause saying the allegations could result in dismissal.

"The above constitute Class I and with aggravating circumstances, possibly Class II offenses, which could result in discipline

²⁵ TR 63, 64-65, 285, 302, 395; Pl exh 5, item "3."

²⁶ TR 302, 304-306.

²⁷ TR 376,

²⁸ TR 377, 382, 396-397.

²⁹ TR 173-175, 195-196.

³⁰ Pl exh 5, "2" p 1.

³¹ TR 381.

³² TR 302, 331, 381; Pl exh 5, "2" p 5.

³³ Pl exh 5; TR 67.

ranging from a written reprimand up to and including **dismissal**."³⁴

On Wednesday, June 14, 1995 there was delivered to and signed for by Mr. Daniel the Notice of a Tuesday, June 20, 1995, disciplinary conference, plus documents totaling 45 pages.³⁵ The notice stated under "Contemplated Disciplinary Action," **"Range of contemplated discipline" - "Written reprimand up to and including dismissal."**³⁶ Mr. Daniel was advised of his right to representation.³⁷

Mr. Daniel was aware that he could provide whatever testimony or evidence he wanted at his disciplinary hearing.³⁸

Mr. Daniel's supervisor advised Mr. Daniel to have a union representative at the hearing.³⁹

Although it was common to seek extensions of time for disciplinary hearings, Mr. Daniel did not ask for any extension.⁴⁰

It was Mr. Daniel's position that management did not support him when the sexual harassment complaint was filed against him.⁴¹

The disciplinary hearing was held on June 20, 1995, at about 9:25 a.m., with Probation Manager James A. Newell, presiding, and Mr. Daniel represented by UAW representative Philip Shilling.⁴²

Mr. Daniel chose "to say nothing," "to remain silent," "to sit in silence," "declined the offer to explain any mitigating circumstances," and "maintained his silence when

³⁴ Pl exh 5. Emphasis added.

³⁵ Pl exh 5, "1"; TR 67.

³⁶ Pl exh 5, "1." Emphasis added.

³⁷ Pl exh 5, "1."

³⁸ TR 193.

³⁹ TR 211.

⁴⁰ TR 193-194.

⁴¹ TR 137.

⁴² Pl exh 5; TR 206.

offered an opportunity to offer mitigating statements or information in regard to this charge."⁴³

Mr. Daniel explained he did not testify and he did not have any witnesses because he was following the advice of his union representative.⁴⁴

The Presiding Officer, Probation Manager Newell, in his report of June 21, 1995 to Area Manager Patten, concluded "that there is a strong basis on which to conclude that the work rules were violated in the manner described for all five counts."⁴⁵

By memo of June 27, 1995, Area Manager Patten sent the "Tony Daniel Disciplinary Packet" to Regional Administrator Noreen Sawatzki, saying, "[s]ince the behavior charged is quite serious, I assume penalty will be determined after appropriate review and assessment."⁴⁶

By memo of July 5, 1995, Regional Manager Sawatzki sent to Deputy Director Robert Steinman the "Employee Disciplinary Report - Tony Daniel," without comment.⁴⁷

On July 29, 1995, Mr. Daniel signed the certified mail receipt for the July 24, 1995 Memorandum from Regional Administrator Sawatzki advising Mr. Daniel of his suspension for ten working days, July 24-31 and August 1-4, 1995.⁴⁸ Attached to the notice of the ten day suspension was a UAW grievance form "should you believe the suspension or duration of same is improper."⁴⁹

⁴³ Pl exh 5.

⁴⁴ TR 68, 194, 207, 211, 379.

⁴⁵ Pl exh 5.

⁴⁶ Pl exh 5.

⁴⁷ Pl exh 5.

⁴⁸ Def exh B; TR 114.

⁴⁹ Def exh B; TR 115.

Mr. Daniel submitted a grievance dated July 28, 1995, saying that the suspension was "without just cause and in violation of his contractual and other rights," with Mr. Daniel seeking to be made "whole in all respects."⁵⁰

Actually, as Mr. Daniel testified, Mr. Daniel signed a blank form, and his union representative filled out the rest.⁵¹

Mr. Daniel complained that when he saw the female attorneys after the disciplinary hearing they would give him the finger (middle finger extended).⁵² Mr. Daniel testified that he wrote complaints, but nothing was done,⁵³ but then he testified that he did not submit any written complaints.⁵⁴ No written complaint about "flipping me the bird" was offered to the Magistrate. Mr. Daniel never said anything to supervisor Price about such an event or events.⁵⁵

Mr. Daniel said that he was taken off cases with Public Defender Brennan in January of 1996,⁵⁶ but Ms. Brennan said that she never had any case with Mr. Daniel after February of 1995.⁵⁷

On December 6, 1996,⁵⁸ when Public Defender Brennan was in a courtroom talking to one of the clerks and one of the recorders about negative divorce experiences, particularly public Defender Brennan's husband "refusing to take care of his children," Public Defender Brennan, unaware that Mr. Daniel was in the room, made a comment

⁵⁰ Def exh C.

⁵¹ TR 121.

⁵² TR 75, 127, 161.

⁵³ TR 75, 161-162.

⁵⁴ TR 141-142.

⁵⁵ TR 386.

⁵⁶ TR 164-165.

⁵⁷ TR 423.

⁵⁸ Pl exh 1.

about her ex-husband being simply a sperm donor.⁵⁹ Mr. Daniel was in the room, and claimed Public Defender Brennan was "[l]ooking right at me,"⁶⁰ so he wrote a memo to supervisor Price about the event⁶¹ because he found it offensive.⁶² But Mr. Daniel admitted Public Defender Brennan was not referring to him.⁶³

The January 10, 1996 response to Mr. Daniel's complaint was written by Area Manager Lois Patten, who advised Mr. Daniel he did not follow the proper procedure since Public Defender Brennan was not an employee of the Department of Corrections, but Public Defender Brennan had been made aware of his complaint.⁶⁴

Mr. Daniel interpreted this response as, "I was supposedly making this up and that, you know, nothing was going to be done from it."⁶⁵

On Saturday, January 27, 1996, while the disciplinary grievance was still proceeding through its four steps, expected to take a year,⁶⁶ Mr. Daniel went to see psychologist Daniel D. DeWitt,⁶⁷ because Mr. Daniel felt he was out of control.⁶⁸

Mr. Daniel saw psychologist DeWitt again on Tuesday, January 30, 1996.⁶⁹

Mr. Daniel's last day of work was Friday, February 2, 1996.⁷⁰

⁵⁹ TR 425-426.

⁶⁰ TR 129.

⁶¹ Pl exh 1; TR 77-78, 162.

⁶² TR 133, 77.

⁶³ TR 129.

⁶⁴ Def exh E; TR 163.

⁶⁵ TR 78.

⁶⁶ Pl exh 5,

⁶⁷ Licensed psychologist Daniel D. DeWitt, PhD, who testified for Mr. Daniel by deposition on November 14, 1996.

⁶⁸ Psychologist DeWitt 5; TR 82, 83, 142.

⁶⁹ Psychologist DeWitt 7.

⁷⁰ TR 20, 73.

On Monday, February 5, 1996, psychologist DeWitt wrote a note to supervisor Price, that Mr. Daniel took to supervisor Price,⁷¹ recommending Mr. Daniel take time off from work "to pursue intensive outpatient treatment."⁷² This was the first time supervisor Price became aware Mr. Daniel was seeing psychologist DeWitt.⁷³

The reason for psychologist DeWitt's recommendation was that Mr. Daniel "exhibited signs of a major depressive disorder and we identified those symptoms and began the treatment at that time."⁷⁴ "His symptoms were quite pronounced when he came in."⁷⁵

Psychologist DeWitt's initial diagnosis was "Major depression, single episode . . . [n]on psychotic and moderate,"⁷⁶ "precipitated by work stress, specifically, the accusations and discipline for sexual harassment and inability to resolve those issues and clear his name. . . ."⁷⁷

Mr. Daniel "talked [to psychologist DeWitt] about going through the grievance process . . . he, in fact, had a grievance relative to his suspension."⁷⁸

On March 11, 1996, psychologist DeWitt felt Mr. Daniel could go back to work, but not in his former job under supervisor Price.⁷⁹

"I was concerned that he would again begin to ruminate and become agitated and depressed if he was in that circumstance."⁸⁰

⁷¹ TR 392.

⁷² Psychologist DeWitt 7.

⁷³ TR 392.

⁷⁴ Psychologist DeWitt 7.

⁷⁵ Psychologist DeWitt 16.

⁷⁶ Psychologist DeWitt 18.

⁷⁷ Psychologist DeWitt 13.

⁷⁸ Psychologist DeWitt 23.

⁷⁹ Psychologist DeWitt 11-12, 22.

⁸⁰ Psychologist DeWitt 12.

On March 7, 1996, more than a month after he left work, Mr. Daniel submitted a request for "reasonable accommodation,"⁸¹ by being transferred to "the Correction Center," because he was "being treated for depression and agitation," because he could not work "in the same environment and subject to the same false accusation presented that prompted my suspension," and because "[t]he prolonged grievance process has delayed resolution. In my mind I keep rehashing events that prompt my suspension and present condition."⁸²

The request was turned down on March 13, 1996, with Mr. Daniel receiving his copy on April 4, 1996.⁸³ The reason for the turn down was the comment made by the ADA Coordinator for the Department of Corrections that Mr. Daniel's request "does not fall within the Americans with Disabilities Act because his medical condition is not substantially limiting and appears to be temporary in nature."⁸⁴

On March 11, 1996, Mr. Daniel signed an Employee Accident Report.⁸⁵

On April 9, 1999, Mr. Daniel was examined by licensed psychologist Edwin F. Kremer, PhD⁸⁶ at the request of the State.

Mr. Daniel described himself as being "helpless," with no opportunity to defend himself, and being denied due process.⁸⁷

After the interview and psychological testing, Psychologist Kremer felt that the key to understanding the situation was Mr. Daniel's "feelings of helplessness."

⁸¹ Pl exh 3,

⁸² Pl exh 3.

⁸³ Def exh F.

⁸⁴ Def exh F.

⁸⁵ Def exh A.

⁸⁶ Psychologist Kremer testified for Mr. Daniel by deposition on November 11, 1996.

⁸⁷ Psychologist Kremer 10-11.

"It would appear that the lack of information from his supervisor, the timing of the hearing, as well as the manner in which he was informed of his suspension could all enhance feelings of helplessness."⁸⁸

Concerning a return to work, psychologist Kremer said it would be safer to return Mr. Daniel to "a situation where he would not be armed."⁸⁹

It was psychologist Kremer's opinion that any disability suffered by Mr. Daniel was the result of the sexual harassment charges filed against him, and how those charges were handled by his employer.⁹⁰

Mr. Daniel filed for Workers' Disability Compensation on June 5, 1996.⁹¹

The last and fourth step in the grievance process, the arbitration hearing, was held on June 17, 1996.⁹²

Clinical psychologist Joseph J. Auffrey,⁹³ PhD examined Mr. Daniel for the State on September 16, 1996.

The diagnosis was chronic moderate depression.⁹⁴

Psychologist Auffrey observed that Mr. Daniel felt persecuted, but Mr. Daniel

⁸⁸ Psychologist Kremer 19.

⁸⁹ Psychologist Kremer 22, 19-20.

⁹⁰ Psychologist Kremer 21.

⁹¹ TR 144.

⁹² TR 143, 374.

⁹³ Psychologist Auffrey testified by deposition for the State on December 4, 1996.

⁹⁴ Psychologist Auffrey 35.

would not take any blame on himself.⁹⁵ Mr. Daniel blamed all of his difficulties on the plotting and scheming of a few people, but there was no misbehavior on his part.⁹⁶

Mr. Daniel was obsessed with persecutory ideation. He thought of himself as morally correct and highly virtuous, without fault,⁹⁷ while everybody else was wrong.⁹⁸ Mr. Daniel was a faker.⁹⁹

Psychologist Auffrey described Mr. Daniel as a person who, when confronted with instances of personal failing, tended to use denial, distortion and projection in order to protect himself, because he could not accept himself as a flawed person.¹⁰⁰

“He is choosing to wallow in a depressive trough, martyred to his job adjustment difficulties. . . .”¹⁰¹

Mr. Daniel was trying to pick his symptoms so he could appear disabled.¹⁰²

But, Mr. Daniel could not go back to his old job because he might hurt somebody.¹⁰³

The Arbitrator's decision relating to Mr. Daniel's grievance was dated September 19, 1996.¹⁰⁴

On the objection of counsel for Mr. Daniel at the hearing before the Magistrate, the Magistrate would not let the counsel for the State introduce the Arbitrator's decision

⁹⁵ Psychologist Auffrey 14, 44.

⁹⁶ Psychologist Auffrey 14, 44.

⁹⁷ Psychologist Auffrey 20, 48.

⁹⁸ Psychologist Auffrey 31.

⁹⁹ Psychologist Auffrey 48.

¹⁰⁰ Psychologist Auffrey 23-24.

¹⁰¹ Psychologist Auffrey 24.

¹⁰² Psychologist Auffrey 32.

¹⁰³ Psychologist Auffrey 24.

¹⁰⁴ TR 126.

into evidence, finding it irrelevant¹⁰⁵ because it had already been established that Mr. Daniel had lost the grievance.¹⁰⁶

At his deposition for Mr. Daniel on November 14, 1996, treating psychologist DeWitt testified that his diagnosis two days earlier, when he last saw Mr. Daniel before the deposition, was the same as when he first saw Mr. Daniel.¹⁰⁷

As of his November 14, 1996 deposition, psychologist DeWitt's recommendation was that Mr. Daniel could go back to work, but not to the probation officer position under supervisor Price.¹⁰⁸

At the request of the State, board qualified psychiatrist Edward Klarman, M.D., saw Mr. Daniel on June 18, 1998.¹⁰⁹

There was nothing wrong with Mr. Daniel.¹¹⁰

Extended therapy was inappropriate.¹¹¹

Mr. Daniel should never have gone off work.¹¹²

I guess what I'm really faulting is the therapist giving him this bum advice. . . .

I'm faulting the therapist for going along with this stress leave. . . .

I'm not going to defer [to] this judgment of this therapist who's been seeing him for two years, waiting around for him to

¹⁰⁵ TR 125-126.

¹⁰⁶ TR 125, 126.

¹⁰⁷ Psychologist DeWitt 18.

¹⁰⁸ TR 22.

¹⁰⁹ Psychiatrist Klarman testified for the State by deposition on June 25, 1998.

¹¹⁰ Psychologist DeWitt 18.

¹¹¹ Psychiatrist Klarman 37, 38-39.

¹¹² Psychiatrist Klarman 39.

make the call on Mr. Daniel's going back to work. Absolutely no.
... "113

Mr. Daniel went back to work on September 21, 1998.¹¹⁴ On August 24, 1998, one week before the August 31, 1998 compensation hearing that is transcribed as volume 4, psychologist DeWitt released Mr. Daniel to return to work without restriction.¹¹⁵ The job Mr. Daniel went back to was exactly the same job he had before.¹¹⁶

Mr. Daniel had to let the State know before September 13, 1998 that he was able to come back to work in order to avoid losing his reemployment rights.¹¹⁷

The following is Mr. Daniel's September 14, 1998 testimonial explanation (counsel for the State refers to the back to work slip being dated after August 31, 1998).

"Q [Counsel for State] [Y]ou sat there and testified that you couldn't go back to work with these people, and then within two days you're providing them with a slip that says,

'I can go back to work now with the very same people that caused me all these problems.'

I just want to know what it was in you personally, in your mind, in your psyche, that changed within those two days?

A Two-and-a-half years of treatment. Being able to process things and me feeling that my job was real important to me.

Q Okay. And that all happened within those two days?

A Two-a-half years and two days."¹¹⁸

¹¹³ Psychiatrist Klarman 43-48.

¹¹⁴ TR 512).

¹¹⁵ Magistrate 11; TR 522. There is reference to this release in the transcript (TR 522), but there is no record of this release being admitted into evidence. It is not listed in the transcript as being identified or admitted.

¹¹⁶ TR 367.

¹¹⁷ TR 511.

¹¹⁸ TR 523-524.

B. The Magistrate's opinion and order.

The Magistrate concluded that after Mr. Daniel's suspension, Mr. Daniel was a "disfavored employee."

"My visceral sensor, in this case, tells me that Plaintiff was a disfavored employee following his suspension. There were identifiable events of employment which supported Plaintiff's perception that he was a disfavored employee. The Department of Corrections blithe rejection of his request for reassignment through the ADA procedures buttresses his impression - and mine.^[119] His supervisor, Jayne Price, testified that she disbelieved Plaintiff's denial of sexual harassment because one time while they were working together, Plaintiff told her: 'You're prettier than most of my supervisors.'^[120] On another occasion, before she became his supervisor, Plaintiff asked her, at a party, what her age was. She says that she was 'offended' by it.^[121] That seems like a rather thin basis for making a credibility determination. It is probably an accurate reflection of Plaintiff's disfavor, and lends credence of [sic] his feeling of disfavor."¹²²

Whether there was a compensable disability had to come from medical proofs, with the Magistrate choosing treating psychologist DeWitt's testimony.

"[D]o those feelings translate to [a] compensable mental disability as opposed to mere disgruntlement over his perceived mistreatment. The answer to that must come from the medical proofs."¹²³

"I believe that Dr. DeWitt's long association with Plaintiff, in a treating capacity, places him in a better position to evaluate Plaintiff's mental status than Dr. Klarman."¹²⁴

"From an overview, it appears to me that Plaintiff did develop mental impairment that precluded his return to work to the full duties of his former job. On a cognitive basis, he could have

¹¹⁹ Mr. Daniel had been gone from work for over a month before he made his ADA request (Pl exh 3; Def exh F).

¹²⁰ TR 385.

¹²¹ TR 385.

¹²² Magistrate 7 (App 11a).

¹²³ Magistrate 7 (App 11a).

¹²⁴ Magistrate 11 (App 15a).

returned to work in a different setting. He was not offered that opportunity. During the time he was off work, it appears that it was medically inadvisable for him to return to work to the same job setting, which included continuing contact with his antagonists. I find, therefore, that Plaintiff had a limitation of his wage earning capacity in work suitable to his qualifications and training until August 24, 1998."¹²⁵

Mr. Daniel's troubles, that he brought on himself by his own misconduct, started with the "discipline for the improprieties of which he was accused."

"Plaintiff's problems started with his discipline for the improprieties of which he was accused. **It is difficult to have much sympathy for this claimant, since he brought these troubles on himself by his own misconduct.** . . . "¹²⁶

The Magistrate awarded benefits because the disciplinary action did not result in termination.

"The salient principal [sic] of Calovecchi v State of Michigan, 223 Mich App 349 (1997) is that acts of discipline not intended to be the equivalent of termination qualify as actual events of employment upon which a claim for work related mental disability may rest: . . .

The Court makes no distinction between acts of discipline based on voluntary acts of an employee versus acts of neglect or omission. . . . Ream v County of Muskegon, 1998 ACO 685: . . . "¹²⁷

"Thus, even if Plaintiff's impairment arises from legitimately imposed discipline, he is entitled to compensation if the act of discipline was a significant contributing factor. I am convinced that the discipline, and the attendant procedures, were employment acts which precipitated Plaintiff's decompensation. Other post-discipline events, which I have discussed earlier, contributed to Plaintiff's mental decompensation up to his last day of work. In applying the Gardner template to this case, no significant non-employment contributing factors have been identified."¹²⁸

"I find in summary, that Plaintiff's discipline, and post-discipline employment events up to February 2, 1996 contributed in a

¹²⁵ Magistrate 11-12 (App 15a-16a).

¹²⁶ Magistrate 12 (App 16a). Emphasis added.

¹²⁷ Magistrate 13 (App 17a).

¹²⁸ Magistrate 13 (App 17a).

significant manner to his development of a disabling condition of depression, anxiety, and uncontrolled anger. He is found to have recovered as of August 24, 1998.”¹²⁹

C. The Commission's opinions and order.

The issue before the Commission was whether Mr. Daniel could take financial advantage of his wrongful conduct.

"The issue presented in this case is whether a mental disability claimant who knowingly engages in wrongful conduct, prompting the necessary employer response, can take financial advantage of the worker's compensation act by collecting benefits as a consequence of the stresses naturally flowing from that wrongful conduct. The magistrate concluded that present case law requires such an injustice. We disagree.”¹³⁰

The Commission was of the opinion that Mr. Daniel's mental disability arose out of his employment.¹³¹

The Majority of the Commission panel, however, concluded that Mr. Daniel was injured by reason of his intentional and willful misconduct, and was thus barred by MCL 418.305¹³² from receiving compensation.

The dissenting Commissioner was of the opinion that §305 was not applicable because, 1) § 305 was not focused on at the hearing, 2) this Court's opinion in *Calovecchi* "may well preclude application of Section 305," and 3)

"Section 305 has been so narrowly interpreted by higher courts that its applicability seemingly has been reduced to situations where the individual's acts are such that he or she knows

¹²⁹ Magistrate 13 (App 17a).

¹³⁰ Commission 1 (App 20a).

¹³¹ Commission 5 (App 24a).

¹³² "If the employee is injured by reason of his intentional and wilful misconduct, he shall not receive compensation under the provisions of this act."

injury is almost certain to occur as a result, and has no possible connection to the workplace."¹³³

The majority said that "Justice cries out that a wrongdoer should not be able to profit from his wrongdoing, when he knows what he is doing is wrong and he knows what the consequences of being caught are going to be."

"Even if we agree that plaintiff became mentally disabled as a consequence of actual events of employment, common sense dictates that cases of misconduct must undergo an additional evaluation. Justice cries out that a wrongdoer should not be able to profit from his wrongdoing, when he knows what he is doing is wrong and he knows what the consequences of being caught are going to be. . . . [T]here can be no doubt that plaintiff knowingly committed wrongful acts. He was found to be a serial harasser. Sexual harassment is strictly forbidden by the Michigan Civil Service Rules. The magistrate in this case recognized that Mr. Daniel was a wrongdoer and due no sympathy, having 'brought these troubles on himself by his own misconduct.' In effect, Mr. Daniel suffered a self-inflicted injury.

It is therefore precisely in a case such as this that Section 305 of the Act should be applied. . . .

Plaintiff's injury (the investigatory and disciplinary process) was the direct result of his intentional and willful misconduct. . . . This is not a case of fault, neglect or inattention--matters the section was not designed to address. *Crilly v Ballou*, 353 Mich 303 (1958). It is instead a case of an individual knowingly engaging in misconduct--behavior strictly prohibited by employer rule distributed to all employees. This is especially important in a mental disability setting. Plaintiff knew what he was doing was wrong, yet he did it anyway, in a consistent and repeated pattern over a long period of time, knowing full well what the consequences of being caught would be. His own intentional wrongdoing brought on the subsequent 'injury' of inevitable investigation and discipline. Section 305 bars recovery in this case. . . .

If any legal principle should play a predominate role in the application of the law, it is that an individual should not profit from his misconduct. Under the interpretation of the law Magistrate Wheaton felt compelled to apply, the most vile and intolerable conduct would not preclude a claimant's recovery as

¹³³ Commission 8 (App 27a).

long as that claimant's bad reaction to entirely proper employer supervisory response became disabling prior to termination. . . . When a person's guilt over having committed misconduct and anger over being caught is a central source of that person's mental problems, should section 301(2)[¹³⁴] ever attribute contributory significance to an employer's fair and reasonable response? . . .
„¹³⁵

This was the order of the Commission:

"The Commission has considered the record and briefs of counsel, and believes that the magistrate's decision should be reversed. Therefore,

IT IS ORDERED that the decision of the magistrate is reversed. Benefits are denied."¹³⁶

D. The Court of Appeals' opinions.

1. The majority

In reversing the Commission, at no time in its opinion does the majority deny or take issue with the factual finding of the Commission¹³⁷ that Mr. Daniel's conduct was sexual harassment "strictly forbidden by the Michigan Civil Service Rules." **In fact the Majority admits that Mr. Daniel violated the Rule against sexual harassment.**

"Thus, even if the WCAC had found evidence that **the rule plaintiff violated** was strictly enforced . . . "¹³⁸

¹³⁴

"Mental disabilities . . . shall be compensable if contributed to or aggravated or accelerated by the employment in a significant manner. Mental disabilities shall be compensable when arising out of actual events of employment, not unfounded perceptions thereof."

¹³⁵ Commission 6-7 (App 25a-26a).

¹³⁶ App 30a.

¹³⁷ Commission 6 (App 25a).

¹³⁸ 248 Mich App at 106; 638 NW2d at 181 (App 42a) (emphasis added)..

“[H]ere, as the WCAC succinctly noted, ‘plaintiff actually did it.’”¹³⁹

Although they labeled Mr. Daniel’s behavior as “voluntary, crude, and unprofessional,” the majority, citing safety rules cases¹⁴⁰ not personal conduct cases, said that Mr. Daniel’s behavior did not rise to intentional and willful misconduct because “mere violation of a work rule is not enough, especially if the rule was not strictly enforced.”¹⁴¹

Citing the principle of legislative acquiescence,¹⁴² that in the year 2000 had twice been rejected by this Court¹⁴³ and once by the Court of Appeals,¹⁴⁴ the majority said that since “intentional and wilful misconduct” had not been defined by statute, silence by the Legislature for many years following judicial construction of a statute suggests consent to that construction.”¹⁴⁵

The majority then selectively defined “intentional and wilful misconduct,” based on the specific results in a limited number of past cases, to conclude that Mr. Daniel’s sexual harassment of female attorneys did not rise to the level of intentional and willful misconduct.¹⁴⁶ None of the cases cited by the majority involved a mental disability

¹³⁹ 248 Mich App at 105; 638 NW2d at 181 (App 41a).

¹⁴⁰ 248 Mich App at 105; 638 NW2d at 181 (App 41a).

¹⁴¹ 248 Mich App at 104; 638 NW2d at 181 (App 40a).

¹⁴² “*Craig v Larson*, 432 Mich 346, 353; 439 NW2d 899 (1989) . . .” (App 40a).

¹⁴³ *Nawrocki v Macomb County Road Commission*, 463 Mich 143, 177 n 33; 615 NW2d 702, 720 n 33 (2000), *Robinson v City of Detroit*, 462 Mich 439, 465 n 25; 613 NW2d 307, 320 n 25 (2000).

¹⁴⁴ *Crown Technology v D & N Bank*, 242 Mich App 538, 552; 619 NW2d 66, 73 (2000), *lv den* 463 Mich 1013 (2001).

¹⁴⁵ 248 Mich App at 104; 638 NW2d at 180 (App 40a).

¹⁴⁶ 248 Mich App at 104; 638 NW2d at 180 (App 40a).

deriving from the consequences of what the majority admits was sexual harassment. The delineation of section 305 is on a case by case basis.¹⁴⁷

Although MCL 418.305 was never an issue or even mentioned in this Court's decision in *Calovecchi v Michigan*,¹⁴⁸ the majority in *Daniel* said that *Calovecchi*, in which workers' disability compensation benefits were found appropriate for a mental disability arising from disciplinary action for unproved and dismissed allegations, had relevance to this *Daniel* proceeding. The relevance, argued the majority, was that in every case where a plaintiff has suffered a mental injury because of an employer's disciplinary proceedings for undismissed charges, workers would be "denied compensation because of willful misconduct."¹⁴⁹

Not only did the majority leave out "intentional," but they failed to recognize that this Court has held that mere violation of a statute or rule is not enough to constitute "intentional and willful misconduct."¹⁵⁰

But, ultimately, the majority's decision reversing the Commission was not based on its discussion of what constitutes 'intentional and willful misconduct,' but was based

¹⁴⁷ See, *Crilly v Ballou*, 353 Mich 303, 327; 91 NW2d 493, 506 (1958).

"The precise future line of demarcation will be marked out, in the traditional manner, by the case-to-case decisions."

See, *Andrews v General Motors Corp*, 98 Mich App 556, 559; 296 NW2d 309, 311 (1980), *lv den* 412 Mich 926 (1982).

¹⁴⁸ 461 Mich 616; 611 NW2d 300.

¹⁴⁹ 248 Mich App at 105; 638 NW2d at 181 (App 41a).

¹⁵⁰ *Day v Gold Star Dairy*, 307 Mich 383, 390-391; 12 NW2d 5, 6 (1943) [trying to pass another car on a wet pavement while going over a hill, thus violating a statute].

"[T]he general rule is that the mere violation of a statute, without more, is not willful misconduct as a matter of law."

on the meaning of "by reason of" in MCL 418.305,¹⁵¹ words from MCL 418.305 that the majority did not define or explain.

"The WCAC erred in its conclusion because 'by reason of' does not extend to the origin of the chain of causation but only to the direct cause of the injury. . . . [E]ven if the WCAC had found evidence that the rule plaintiff violated was strictly enforced, and that plaintiff's conduct arose to 'intentional and wilful misconduct' as defined by the courts, the statutory requirement of causation is still not met."¹⁵²

The majority did not follow this Court's 1962 plurality guidance from *Trombley v Coldwater State Home and Training School*:

"When a first cause produces a second cause that produces a result, the first cause is the cause of that result."¹⁵³

The majority criticized the Commission's approach because "plaintiff was not injured at the time of his act."

"Basically, this [Commission] interpretation means that although plaintiff's act by itself did not result in injury (as it might have if his alleged target had retaliated physically), the discipline imposed should have been foreseen and was an obvious and expected outcome of the act, and is either merged with the act or formed an unbroken link between the act and the injury. . . . The WCAC repeatedly asserted that plaintiff knew he would be disciplined. However, plaintiff has insisted since 1995 that he did nothing wrong, that he made no offensive comments¹⁵⁴. His victims allege that he made offensive comments multiple times, but until 1995, plaintiff had suffered no adverse consequences from this behavior. . . .

If plaintiff had not been an employee his act would not have resulted in injury. He was injured solely because of his status as an employee; clearly plaintiff was not injured at the time of his

¹⁵¹ "If the employee is injured by reason of his intentional and wilful misconduct, he shall not receive compensation under the provisions of this act."

¹⁵² 248 Mich App at 106; 638 NW2d at 181 (App 42a).

¹⁵³ 366 Mich 649, 670; 115 NW2d 561, 571 (1962).

¹⁵⁴ That was conclusively proved wrong by prompt disciplinary action, and subsequent unsuccessful appeals. 248 Mich App at 98-99; 638 NW2d at 177-178 (App 34a-35a).

act. . . . We thus find in this case that plaintiff's injury did not occur by reason of his conduct."¹⁵⁵

The majority said that "[h]is victims allege that he made offensive comments multiple times, but until 1995, plaintiff had suffered no adverse consequences from his behavior."¹⁵⁶ From this the majority engaged in constitutionally¹⁵⁷ and statutorily¹⁵⁸ forbidden fact finding, "that the [Civil Service] rule was not strictly enforced and there are no facts in the record indicating otherwise."¹⁵⁹

It is assumed the majority is saying that Mr. Daniel felt free to sexually harass female attorneys because there was no common understanding that the rules against sexual harassment would be strictly enforced. The majority does not explain how it arrived at this conclusion solely on the basis of Mr. Daniel's conduct, conduct in which the regulations against sexual harassment were immediately and strictly enforced as soon as Mr. Daniel's intentional and willful misconduct was reported.

2. The dissent.

The dissenter began his dissent by pointing out that the majority's opinion permitted Mr. Daniel to engage in misconduct without being held accountable.

"By repeatedly sexually harassing female attorneys, plaintiff [Daniel] engaged in intentional and willful misconduct. Moreover, plaintiff's resulting mental disability flowed directly and predictably from his behavior. Allowing 'serial sexual harasser[s]' to profit from their misdeeds is an untenable result not contemplated by the Workers' Disability Compensation Act . . . ¹⁶⁰

¹⁵⁵ 248 Mich App at 102-103; 638 NW2d at 179-180 (App 38a-39a).

¹⁵⁶ 248 Mich App at 102-103; 638 NW2d at 180 (App 38a-39a).

¹⁵⁷ Const 1963, art 6, § 28.

¹⁵⁸ MCL 418.861a(14).

¹⁵⁹ 248 Mich App at 105; 638 NW2d at 181 (App 41a).

¹⁶⁰ 248 Mich App at 106; 638 NW2d at 181 (dissent) (App 42a).

“The WCAC characterized plaintiff as a ‘serial sexual harasser.’ In my view, granting worker’s compensation disability benefits to plaintiff is contrary to the concept of holding an individual accountable for their misconduct.”¹⁶¹

The dissent properly explained that under the Workers’ Disability Compensation Law, matters of fact are reserved to the Commission in the absence of fraud.¹⁶²

The dissent pointed out that the majority engaged in its own fact finding.

“Neither the magistrate nor the WCAC made any factual findings about the enforcement of the rules. Consequently, I believe it is inappropriate for the majority to make a presumption concerning defendant’s enforcement, or lack thereof, of the civil service rules on sexual harassment.”¹⁶³

The dissent pointed out further what the factual matters were in the *Daniel* case.

”[M]atters of causation are factual determinations.”¹⁶⁴

“Whether an individual’s willful and intentional misconduct was responsible for a claimant’s injury is also a question of fact.”¹⁶⁵

“Whether an individual engaged in willful and intentional misconduct is a factual determination.”¹⁶⁶

The dissent then showed that Mr. Daniel’s “reprehensible” conduct was intentional and willful misconduct.

“Plaintiff, a veteran probation officer with the Michigan Department of Corrections is hard-pressed to assert that he did not know such behavior was prohibited by defendant, or that he was unaware he was subjecting himself to potential serious

¹⁶¹ 248 Mich App at 107 n 1; 638 NW2d at 182 n 1 (dissent) (App 43a).

¹⁶² 248 Mich App at 110; 638 NW2d at 183 (dissent) (App 46a), citing “*Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 701; 614 NW2d 607, 612 (2000).

¹⁶³ 248 Mich App at 112 n 5; 638 NW2d at 185 n 5 (dissent) (App 40a).

¹⁶⁴ 248 Mich App at 113; 638 NW2d at 185 (dissent) (App 49a), citing, e.g., “[s]ee *Staggs v Genesee District Library*, 107 Mich App 571, 574; 495 NW2d 832 (1992).”

¹⁶⁵ 248 Mich App at 113; 638 NW2d at 185 (dissent) (App 49a), citing, “*Chrysler v Blue Arrow Transport Lines*, 295 Mich 606, 609; 295 NW 331 (1940).”

¹⁶⁶ 248 Mich App at 109; 638 NW2d at 183 (dissent) (App 45a).

consequences. The WCAC found that plaintiff sexually harassed women on multiple occasions, acting with absolute disregard for the consequences of his actions; Accordingly, though I recognize that § 305 has not been applied in the present factual context, in my opinion invocation of the provision is warranted here, where plaintiff voluntarily engaged in reprehensible conduct and incurred a mental disability as a consequence.”¹⁶⁷

Further, the dissent showed that Mr. Daniel’s mental disability was “by reason of” his intentional and willful misconduct.

“Though plaintiff’s injury did not arise contemporaneously from his misconduct, it cannot be disputed that his misconduct was the starting point for the resultant disciplinary proceedings that ultimately caused his injury. Had plaintiff not engaged in sexual harassment, he would not have been subjected to the disciplinary proceedings, and he would not have been suspended from his job. In my view, the disciplinary proceedings, from which plaintiff’s mental disability arose, flowed directly and predictably from plaintiff’s misconduct assuredly as night follows day. In other words, the link between plaintiff’s misconduct, the disciplinary proceedings, and his ensuing mental disability formed a continuous, unbroken chain of causation to the extent that § 305 applies to bar his claim for worker’s compensation disability benefits.”¹⁶⁸

The dissent also pointed out that *Calovecchi* is not applicable.

“[T]he majority is ill advised to draw parallels between the instant case and *Calovecchi* regarding the applicability of § 305 where the issue whether § 305 applied to bar the plaintiff’s claim for disability benefits was not raised in *Calovecchi* or considered by our Supreme Court.”¹⁶⁹

This Court granted leave on July 2, 2002.

¹⁶⁷ 248 Mich App at 112-113; 638 NW2d at 184 (dissent) (App 48a-49a).

¹⁶⁸ 248 Mich App at 115-116; 638 NW2d at 186 (dissent) (App 51a-52a).

¹⁶⁹ 248 Mich App at 116; 638 NW2d at 186 (dissent) (App 52a).

Summary of Argument

A *potpourri* of decisions over the last 90 years has left the Court of Appeals and the administrative decision makers without clear guidance on the 90-year-old unchanged MCL 418.305, which denies workers' disability compensation benefits to an employee for an injury that was "by reason of his intentional and wilful misconduct." It is important to take an approach that maintains fidelity to the requirement set forth by the Legislature in 1912, while providing the Court of Appeals and the administrative decision makers with a clear standard to follow, applying the statutory language as written.

Mr. Daniel's proven sexual harassment of female attorneys was misconduct, improper and wrongful conduct, as shown by the very nature of his conduct, which was held to be crude and unprofessional, was in violation of the Civil Service Rules, was in violation of the Department of Corrections Rules, and was against public policy. The Magistrate said "[i]t is difficult to have much sympathy for this claimant, since he brought these troubles on himself by his own misconduct. . . ."

The proven conduct by Mr. Daniel was "wilful," that is, it was deliberate. It was voluntary, it was persistent and repeated, and it was self-motivated, it was not a thoughtless or a spur of the moment act.

The proven sexual harassment by Mr. Daniel was "intentional," it was more than serious. There were complaints by female attorneys over a period of time until finally, in frustration, Mr. Daniel's conduct was reported to his superior. One's visceral reaction to Mr. Daniel's proven conduct was more than serious. Mr. Daniel's proven conduct was prohibited by law, by rule, and by public policy. Mr. Daniel's proven conduct subjected him to a possible discharge from the Department of Corrections.

And, Mr. Daniel's temporary mental disability arose in a direct chain from his proven sexual harassment of female attorneys, through the subsequent sequence of allegations, investigation, hearings, disciplinary action, and resolution of Mr. Daniel's

grievance. But for Mr. Daniel's proven sexual misconduct, he would not have suffered an injury, his temporary mental disability, due to the disciplinary action that followed his sexual harassment of female attorneys. In other words, Mr. Daniel's temporary mental disability arose "by reason of" his intentional and willful misconduct.

Under MCL 418.305, Mr. Daniel "shall not receive compensation. . . ."

Argument

A mental disability claimant who engages in intentional and willful misconduct, prompting the necessary employer response, should not be allowed to take financial advantage of the worker's compensation act by collecting benefits as a consequence of the stresses naturally flowing from that intentional and willful misconduct.

- A. Mr. Daniel's "injury," his temporary mental disability, was "by reason of his intentional and wilful misconduct," by reason of his sexual harassment of female attorneys.**

The following language has appeared in the Workers' Disability Compensation Act since 1912 (unchanged except "employee" is now spelled "employee").

"If the employee is injured by reason of his intentional and wilful misconduct, he shall not receive compensation under the provisions of this act."¹⁷⁰

According to 2 Larson's Workers' Compensation Law (Matthew Bender, N.Y., N.Y., 2000) §34.01, pp 34-2, Michigan is the only state that uses this statutory language.¹⁷¹

The first question, then, is what did the Legislature intend when using the words "by reason of his intentional and wilful misconduct" in Michigan's workers' disability compensation law?

- 1. MCL 418.305 in context: Part of "AN ACT to promote the welfare of the people of this State relating to the liability of employers for injuries . . . sustained by their employes, [and] providing compensation for the accidental injury to . . . employes . . . "**

¹⁷⁰ 1912 PA (1st ex sess) Part II, Sec. 2, now MCL 418.305.

¹⁷¹ A Lexis search of Michigan statutes reveals that "intentional and willful misconduct" is limited to MCL 418.305. A Lexis search of all state statutes and the federal statutes-at-large failed to disclose any using the words "intentional and willful misconduct."

In 1911 PA 245, the Legislature created a Commission of Inquiry to investigate the problems involved in compensation for accidental injuries to workmen arising out of and in the course of employment.

In its 1911 Report, the Commission contemplated and submitted proposed legislation “to give compensation to every accident irrespective of fault, **unless the fault be wilful on the part of the employee.**”¹⁷²

The Commission proposed, and the bill as introduced in the Michigan Legislature on February 26, 1912, included the following language, using the language “serious and wilful misconduct,” from the British 6 Edw. 7, c. 58 1 (2) (c)[1906].¹⁷³

“PART II . . .

Sec 2. If the employe is injured by reason of his serious and wilful misconduct, he shall not receive compensation under the provisions of this act.”¹⁷⁴

But, when the bill was reported out of the House Committee on Labor on March 8, 1912, it was recommended that the word "serious" be changed to "intentional," and the

¹⁷² Report p 32 (App 55a).

¹⁷³ “If it is proved that the injury to a workman is attributable to the **serious and wilful misconduct** of that workman, any compensation claimed in respect of that injury shall, unless the injury results in death or serious and permanent disablement, be disallowed. . . . ” (emphasis added).

¹⁷⁴ HB 1 (1912) [1st ex sess] (App 57a).

recommendation was adopted.¹⁷⁵ “Intentional and willful misconduct” became the law.¹⁷⁶

The pertinent parts of 1912 (1st ex sess) PA 10, were:

“AN ACT . . . providing compensation for the accidental injury^[177]
to . . . employes . . .

Part I . . .

Section 1. In an action to recover damages for personal injury
sustained by an employe in the course of his employment . .
. it shall not be a defence:

(a) That the employe was negligent, unless and except
it shall appear that such negligence was wilful^[178] .

..

Part II

Sec. 1. If an employe . . . receives a personal injury arising out of
and in the course of his employment by an employer who is
at the time of such injury subject to the provisions of this
act, he shall be paid compensation

¹⁷⁵ 1912 (1st ex sess) Journal of the House 74-75 (App 58a, 59a), *McMinn v C. Kern Brewing Co.*, 202 Mich 414, 423; 168 NW 542, 545 (1918), *Day v Gold Star Dairy*, 307 Mich 383, 390-391; 12 NW2d 5, 6 (1943).

¹⁷⁶ 1912 PA (1st ex sess) Part II, Sec. 2.

The wording used in British law was coherent, "serious" described the degree of misconduct, "wilful" described the motivation. However, when the Michigan Legislature substituted "intentional" for "serious" a problem was created because in 1912 "wilful" also meant "intentional." *Ernst v Grand Rapids Engraving Co*, 173 Mich 254, 256; 138 NW 1050, 1051 (1912), *People v Jewell*, 138 Mich 620, 622; 101 NW 835, 836 (1904), X The Century Dictionary and Cyclopedia (The Century Co, N.Y. 1911) pp 6925, 3156. See, *Highway Commissioners of Eagle Township v Thomas Ely*, 54 Mich 173, 181; 19 NW 940, 944-945 (1884).

¹⁷⁷ 1937 PA 61 began the coverage of “occupational diseases.”

"Personal injury" continued to be interpreted as meaning "accident" until *Sheppard v Michigan National Bank*, 348 Mich 577; 3 NW2d 614 (1957), although the Legislature had removed the word "accident" from most of the law in 1943 PA 245.

It was in 1960, in *Carter v General Motors Corporation*, 361 Mich 577; 106 NW2d 105 (1960), that this Court first began to recognize a mental disability standing alone. *Carter* has been described as "the first time that a state supreme court recognized the compensability of disability caused solely by protracted stress under a workers' compensation law." R. Slovenko, Reflections on the Criticisms of Psychiatric Expert Testimony, 25 Wayne L.Rev. 37, 60 n 74 (1978).

¹⁷⁸ “The inherently contradictory phrase, ‘negligence was wilful,’ is unfortunate, but the meaning is clear.” *Beauchamp v Dow Chemical Co*, 427 Mich 1, 13; 388 NW2d 882, 887 (1986).

Sec 2. If the employe is injured by reason of his intentional and willful misconduct, he shall not receive compensation under the provisions of this act.”

2. The meaning of "by reason of his intentional and wilful misconduct."

a. The background of MCL 418.305.

We begin, as always, seeking to “ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute and avoid an interpretation that would render any part of the statute surplusage or nugatory. . . . Further, we give undefined statutory terms their plain and ordinary meanings.”¹⁷⁹

If MCL 418.305 is ambiguous, an attempt is then made “to discern the legislative intent underlying the ambiguous words. Only if that inquiry is fruitless, or produces no clear demonstration of intent, does a court resort to the remedial preferential rule . . . ,”¹⁸⁰ “liberally construing [the statute] to grant rather than deny benefits,” that was relied on by the Court of Appeals majority.¹⁸¹

There is a special interpretive aid present in this case, because the 1912 Michigan statute was taken in part from a 1906 British statute.

Since the “intentional and wilful misconduct” language of MCL 418.305 derives in part from a British statute, it follows, as this Court said in *Hopkins v Michigan Sugar*

¹⁷⁹ *State Farm Fire and Casualty Co v Old Republic Insurance Co*, 466 Mich 142, 146; 644 NW2d 715, 717 (2002).

¹⁸⁰ *Crowe v Singleton*, 465 Mich 1, 13; 631 NW2d 293, 300 (2001).

¹⁸¹ 248 Mich App at 101; 638 NW2d at 179 (App 37a).

Co,¹⁸² and *Amicucci v Ford Motor Co*,¹⁸³ that we can look to the meaning given the British act by the British courts to help us derive the meaning intended by the Michigan Legislature.

This was the language of 6 Edw. 7, c. 58 [1906]:

"Be it enacted &c:-

1.-(1) If in any employment personal injury by **accident** arising out of and in the course of the employment is caused to a workman, his employer shall, subject as herein-after [sic] mentioned, be liable to pay compensation in accordance with the First Schedule to this Act.

(2) Provided that . . . -

(c) If it is proved that **the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall**, unless the injury results in death or serious and permanent disablement, **be disallowed**. . . . " (emphasis added).

This Court twice favorably quoted the Michigan Industrial Accident Board to the effect the Legislature intended "intentional and wilful misconduct" to mean something more than "serious and wilful misconduct."¹⁸⁴

This background leads us to the meaning intended by the Legislature of the words in the statute.

- b. As used in MCL 418.305:
"misconduct" means improper conduct or wrongful behavior;
"wilful" means a deliberate act, not a thoughtless spur of the moment act,

¹⁸² 184 Mich 87, 90; 150 NW 325, 326 (1915).

¹⁸³ 308 Mich 151, 154; 13 NW2d 241, 242 (1944):

""[A] personal injury arising out of and in the course of his employment' . . . is adopted in identical words from the English workmen's compensation act, and presumably with the meaning previously given it there."

¹⁸⁴ *McMinn v C. Kern Brewing Co*, 202 Mich 414, 423; 168 NW 542, 545 (1918), *Day v Gold Star Dairy*, 307 Mich 383, 391; 12 NW2d 5, 6 (1943).

**“intentional” means that the degree of misconduct, not the actual consequences, was more than “serious,” and
“by reason of” means “but for,” “by nature of,” “on account of,” or “because of.”**

i. “Misconduct.”

The ordinary meaning of “misconduct” has been and continues to be “improper conduct or wrongful behavior.”¹⁸⁵ In 1985, this Court said in *Hammons v City of Highland Park Police Department*:

“The term ‘misconduct’ suggests culpability or wrongdoing.”¹⁸⁶

ii. “Intentional and wilful.”

“Wilful” in the British act meant deliberate, not thoughtless, and “serious” referred to the degree of misconduct, not to the consequences. As said by Lord Loreburn, L.C., in the oft cited *Johnson v Marshall, Sons & Co, Limited*,

“The word ‘wilful, I think, imports that the misconduct was deliberate, not merely a thoughtless act on the spur of the moment. Further, the Act says it must be ‘serious,’ meaning not that the actual consequences were serious, but that the misconduct itself was so.”¹⁸⁷

It is logical to assume from the 1912 Michigan statute and its British antecedent that in MCL 418.305, **“wilful misconduct”** in the Michigan act **means a deliberate act, not a thoughtless spur of the moment act**; and, with “intentional” being substituted for “serious,” the use of **“intentional”** in the Michigan Act **means that the degree of**

¹⁸⁵ E.g., VI A New English Dictionary (The Clarendon Press, Oxford 1908) p 503. IX The Oxford English Dictionary, 2d ed (The Clarendon Press, Oxford, 1989) p 855. Webster’s Third New International Dictionary of the English Language, Unabridged (Merriam Webster, Springfield, Mass 1964) p 1443.

¹⁸⁶ 421 Mich 1, 14; 364 NW2d 575, 581 (1985).

¹⁸⁷ 1906 A.C. 409, 411-412. *Accord*: Klocker, Workmen’s Compensation Digest (Butterworth & Co, London 1912) p 113, Chartres, Judicial Interpretations of the Law Relating to Workmen’s Compensation (Butterworth & Co, London 1915) p 337.

misconduct was more than “serious,” not that the actual consequences were more than “serious.”

iii. “By reason of.”

When the Legislature in 1912 enacted what is now MCL 418.305, and did not use the British wording “attributable to,” but, instead, used the wording “by reason of,” the Legislature was choosing words that in 1912 had come to have a specific meaning over a wide spectrum of the law.¹⁸⁸

“By reason of” meant “but for,” “by nature of,” “on account of,” or “because of.”¹⁸⁹

Of particular interest and relevance in giving meaning to “by reason of” was the 1907 U.S. Supreme Court case of *United States v William Cramp & Sons Ship & Engine Building Co.*¹⁹⁰ showing that “by reason of” meant “but for.”

A shipbuilding contract had a clause providing for the last payment,

“when all the conditions, covenants, and provisions of said contract shall have been performed and fulfilled by and on the part

¹⁸⁸ “If the employe is injured **by reason of** his intentional and wilful misconduct, he shall not receive compensation under the provisions of this act.” (emphasis added).

¹⁸⁹ *United States v William Cramp & Sons Ship & Engine Building Co* 206 US 118, 127-128; 27 SCt 676, 678; 51 LEd 983, 986 (1907) (“but for”) [shipbuilding contract], *Sharkey v Skilton*, 83 Conn 503, 509; 77A 950, 952 (1910) (“because of” “on account of”) [action for damages from negligence], *Strobhar v Florida*, 55 Fla 167, 171; 47 So 4, 6 (1908) (“on account of” “by nature of”) [indictment of employee for conversion of railroad’s money], *Dunbar v Montreal River Lumber Co*, 127 Wis 130, 132; 106 NW 389, 390 (1906) (“on account of”) [damages for conversion of lumber], *Hornbrook v Town of Elm Grove*, 40 WVa 543, 546; 21 SE 851 (1895) (“because of”) [forfeiture of town charter], *Strong v Sun Mutual Insurance Co*, 31 NY 103, 105 (1865) (“on account of” “by reason of”) [liability of insurance company for the bursting of a boiler on a ship]. See, *Basler v Sacramento Electric, Gas and Railway Co*, 166 Cal 33, 36-37; 134 P 993, 994 (1913) (“because of” “on account of”) [spouse’s action for accident by wife on a streetcar].

¹⁹⁰ 206 US 118; 27 SCt 676; 51 LEd 983 (1907).

of the party of the first part,’ and ‘on the execution of a final release to the United States in such form as shall be approved by the Secretary of the Navy, of all claims of any kind or description under or by virtue of said contract.’”¹⁹¹

The shipbuilding company executed a release that included “by reason of” language, to

“‘remise, release and forever discharge the United States of and from all and all manner of debts, dues, sum and sums of money, accounts, reckonings, claims and demands whatsoever, in law or in equity, for or **by reason of** or on account of the construction of said vessel under the contract aforesaid.’”¹⁹²

The shipbuilder claimed that the release, with the “by reason of” language, “applies simply to claims springing out of the construction of the vessel . . . ‘[C]onstruction’ . . . is limited to the mere matter of building; that is, the furnishing of materials, the doing of work, and does not include delays or other matters outside the building of the vessel.”¹⁹³

The United States Supreme Court rejected this argument, being of the opinion that the words “by reason of” in the release were broad and all encompassing, that is, but for the contract and the construction there would not be any other types of claims.

“It is only by reason of the performance of the contract in the vessel that these claims [delays, etc] arise. **But for** the contract, and the construction of the vessel under it, there would be no such claims. No payment of extra money is necessary to sustain this release.”¹⁹⁴

¹⁹¹ 206 US at 126; 27 SCt at 678; 51 LEd at 986.

¹⁹² 206 US at 127; 27 SCt at 678; 51 LEd at 986. Emphasis added.

¹⁹³ 206 US at 126; 27 SCt at 678; 51 LEd at 985-986.

¹⁹⁴ 206 US at 127-128; 27 SCt at 678, 51 LEd at 986. Emphasis added.

A recent Lexis search revealed that “by reason of” appears 21 times in the Michigan Constitution, and in 639 Michigan statutes.

The language, “by reason of his intentional and willful misconduct,” meant in 1912, and, unchanged, means today:

- “Misconduct,”
improper or wrongful conduct.
- “Willful,”
a deliberate act, not a thoughtless or spur of the moment act.
- “Intentional,”
the degree of conduct, not the actual consequences, was more than serious.
- “By reason of,”
but for, by nature of, on account of, or because of..

Thus, the language of the statute itself leads to a simple step by step process to determine;

1. Was the conduct improper or wrongful?
2. Was the conduct deliberate [not a thoughtless spur of the moment act]?
3. Was the degree of conduct [not the consequences] more than serious?
4. But for the intentional and willful misconduct would the employee have been injured [or was the employee’s injury by nature of, or on account of, or because of, the employee’s intentional and willful misconduct]?

This Court has repeatedly held that the answer to these questions, the answer to whether an employee’s injury was “by reason of his intentional and wilful misconduct,” is a question of fact.¹⁹⁵

¹⁹⁵ E.g., *McMinn v G. Kern Brewing Co*, 202 Mich 414, 430; 168 NW 542, 547 (1918) [hit pile of bricks while driving over the statutory speed limit], interpreting *Clem v Chalmers Motor Co*, 178 Mich 340, 345; 144 NW 848, 850 (1914) [slid down a rope from a roof for a coffee break instead of using a ladder], *Day v Gold Star Dairy*, 307 Mich 383, 390, 391; 12 NW2d 5, 6 (1943) [trying to pass another car on a wet pavement while going over a hill], *Lopucki v Ford Motor Co*, 109 Mich App 231, 242; 311 NW2d 338, 343 (1981) [use of company pool car and gasoline in violation of company policy].

An injury by reason of negligence is not enough to constitute “intentional and wilful misconduct” because 1912 (1st ex sess) PA 10, Part I, Sec. (1)(a), did away with the “defence . . . [t]hat the employe was negligent”¹⁹⁶

Whatever the reason, there has not been any consistent and coherent interpretation of this statute.

3. From a *pot pourri* of cases over the last 90 years there has been a *pot pourri* of interpretations of MCL 418.305.

An opinion giving an overall meaning of the statute is hard to find. An early one was *Haller v City of Lansing*,¹⁹⁷ in which this Court, citing British precedents, used a broad approach, interpreting “intentional and wilful misconduct” as referring to an action that “broke the so-called nexus between workman and employer.”

“From an examination of the cases . . . we think it manifest that the controlling reason for denying an award in those cases rests upon the proven facts that the employee broke the so-called nexus between workman and employer by some manifestly reckless and unreasonable hazard, amounting to intentional and wilful misconduct”¹⁹⁸

¹⁹⁶ E.g., *Gignac v Studebaker Corp*, 186 Mich 574, 576-577; 152 NW 1037 (1925) held gross negligence was not enough to constitute “intentional and willful misconduct.”

“While it is quite clear that the claimant’s injury was brought about by his own gross negligence, we are of [the] opinion that it cannot be said as a matter of law that he was guilty of such intentional and wilful misconduct as would defeat his recovery.” [while checking automobiles on freight cars, employee’s foot was crushed when the train backed up; and the employee’s foot was caught on a coupling between a water tank and the end car].

¹⁹⁷ 195 Mich 753, 761; 162 NW 335, 337 (1917) [lighting of pipe in tool house where laborers went to eat brought from home lunches on cold day ignited gasoline fumes].

¹⁹⁸ This causal nexus approach was utilized in *Mitchell v City of Pontiac*, 1997 ACO 107; 1997 WCACO 491, 493 (February 20, 1997) [mental disability as a result of a criminal investigation for police officer allegedly stealing money from a person whom he had stopped for a traffic violation].

The 1922 *Fortin v Beaver Coal Co*,¹⁹⁹ referred to conduct of a quasi-criminal nature or a reckless disregard of a statute.

"If . . . the conduct occasioning the injury is of a quasi-criminal nature, involving the intentional doing of something with knowledge that it is dangerous and with a wanton disregard of consequences, then it is intentional and wilful misconduct."²⁰⁰

"Such reckless disregard of the statute and invitation of the very consequences the statute was enacted to avoid being a voluntary act on the part of the deceased, involving plan and effort and calculation and not being in furtherance of any of his duties nor under the direction of his superior, constituted intentional and wilful misconduct on his part and bars compensation to his dependents."²⁰¹

Some cases simply made a determination on the facts whether an employee's injury was "by reason of his intentional and wilful misconduct."²⁰²

Some cases spoke of the foreseeability by the employee of an injury.²⁰³

Some cases found that an injury resulting from a violation of a safety rule was not by reason of intentional and willful misconduct, unless the rule was strictly or rigidly

¹⁹⁹ 217 Mich 508; 187 NW 352 (1922) [employee was hit by a piece of coal falling down a mine shaft and was instantly killed while the employee was jumping across the sump at the bottom of the mine shaft in violation of a State misdemeanor safety law].

²⁰⁰ 217 Mich at 510; 187 NW at 352.

²⁰¹ 217 Mich at 511; 187 NW at 352.

²⁰² *Ramlow v Moon Lake Ice Co*, 192 Mich 505, 508; 158 NW 1027, 1028 (1916) [lying to doctor's question about a being an alcoholic is not "intentional and willful misconduct"], *Beaudry v Watkins*, 191 Mich 445, 158 NW 16 (1916) [bicycle delivery boy killed when truck to which he was holding on swerved and threw him to the street, after which he was run over by a following truck, is not "intentional and willful misconduct"],

²⁰³ *Clem v Chalmers Motors Co*, 178 Mich 340, 345; 144 NW 848, 850 (1914) [not foresee sliding down a rope from a roof for a coffee break instead of using a ladder would lead to being hurt], *Waldbauer v Michigan Bean Co*, 278 Mich 249, 254; 270 NW 285, 287 (1936). [employee killed by poisonous gas in a rye bin into which he had himself lowered, knowing full well the effects of the gas and the possible consequences].

enforced.²⁰⁴

Other cases utilized the standard of “acts for which the employee would be fired [²⁰⁵], i.e., criminal offenses or violations of strictly enforced company rules.”²⁰⁶

Voluntary intoxication has been considered intentional and willful misconduct.”²⁰⁷

Two often cited opinions did not even involve MCL 418.305, but referred to it in *dicta*. The opinions are this Court’s 1958 *Crilly v Ballou*,²⁰⁸ and this Court’s 1986 *Beauchamp v Dow Chemical Co.*²⁰⁹

Crilly, concerned with the meaning of “course of employment,” involved young roofers engaging in “horseplay” by throwing roofing shingles. Concerning “course of employment,” this Court said:

²⁰⁴ *Rayner v Sligh Furniture Co*, 180 Mich 168, 170-171; 146 NW 665, 666 (1914) [injured while running towards the time clock in violation of an unenforced rule], *Allen v National Twist Drill & Tool Company*, 324 Mich 660, 664; 37 NW2d 664, 666 (1949) [rule requiring wearing safety mask while sandblasting not strictly enforced]. *Accord: Shepard v Brunswick Corp*, 36 Mich App 307; 193 NW2d 370 (1972), *lv den* 386 Mich 776 (1971) [rule requiring wearing safety mask while dipping bowling balls in dipping tank containing toluene was not strictly enforced].”

²⁰⁵ *Rivers v State of Michigan*, 1997 ACO 139; 1997 WCACO 612 (March 4, 1997) [corrections officer having sex with female prison inmates], *lv den* Aug 7, 1997 (CtApp Docket No. 202080).

²⁰⁶ *Widman v Schad Boiler Setting Co*, 1997 ACO 360; 1997 WCACO 1553, 1555 (June 25, 1997), *lv den* Feb 20, 1998 (CtApp Docket No. 204802) “criminal offenses or violations of strictly enforced company rules” [no evidence that under-medication of medical condition was intentional or wilful],

²⁰⁷ *Lee v Automobile Club Ins. Assn*, 1998 ACO 400; 1998 WCACO 1852, 1858, *lv den* Oct 8, 1998 (COA Docket No 213361), *Wyskiel v CSI Industrial Systems Corp*, 1998 ACO 395; 1998 WCACO 1835, 1838, *lv den* Nov 17, 1998 (COA Docket No 213148, *lv den* 461 Mich 912 (1999). *Barrons v Saffron Billiard Supply*, 1996 ACO 474; 1996 WCACO 2277, 2280-2281. *See, Dean v Chrysler Corp*, 434 Mich 655, 684; 455 NW2d 699, 712 (1990) (dissent, Archer), *Scroggins v Corning Glass Co*, 382 Mich 628, 630-631; 172 NW2d 367, 368-369 (1969).

²⁰⁸ 353 Mich 303; 91 NW2d 493 (1958).

²⁰⁹ 427 Mich 1; 398 NW2d 882 (1986).

“Compensation . . . was not to be barred by fault, or neglect, or inattention, that is, for the mere human failings of the workman. In short, no longer need the workman be free from fault to receive recompense.”²¹⁰

It was only in passing and incidental *dicta* that this Court said the following was “intentional and wilful misconduct”:

“Excluded . . . under the terms of the statute are acts of such great and reprehensible nature as to constitute intentional and willful misconduct. (C.L. 1948, § 412.2 [Stat. Ann. 17.1521]).” [now MCL 418.305].²¹¹

Beauchamp was dealing with the fact there was then no statutory exclusion for intentional torts by the employer against the employee.

In arriving at its conclusion that intentional torts by employers against employees were not encompassed within the Workers’ Disability Compensation Act, this Court explained in *Beauchamp* that the 1912 Act covered only accidents, and that although the only non-accidental acts explicitly addressed and excluded by the Act were “an employee’s self inflicted injuries,” since intentional wrongs by an employer on an employee were not accidents, they too were excluded from the act, and an action may be had in Circuit Court. [An intentional tort exclusion was added to the Act by 1987 PA 28; MCL 418.131(1)].

Beauchamp included within its discussion *dicta* to the effect self inflicted injuries were not compensable, and an employee cannot use the workers’ compensation act as a means of benefiting from his “own intentional misconduct.”

²¹⁰ *Crilly*, 353 Mich at 308; 91 NW2d at 496. *Accord: Michalski v Central Window Cleaning Co*, 292 Mich 465, 466; 200 NW 870, 871 (1940), *Gignac v Studebaker Corporation*, 186 Mich 574, 575; 152 NW 1037, 1037 (1915).

²¹¹ *Crilly*, 353 Mich at 327; 91 NW2d at 506. *Accord, Andrews v General Motors Corp*, 98 Mich App 556, 560; 296 NW2d 309, 311 (1980), *lv den* 412 Mich 926 (1982). *See, Harrison v Tireman & Colfax Bumper Repair Shop*, 395 Mich 48, 50; 232 NW2d 274, 275 (1975).

“The [1912] workers’ compensation act . . . was a comprehensive restructuring of the mechanism for dealing with accidental injuries.

...

The only non accidental acts explicitly addressed by the [1912] act are an employee’s self-inflicted injuries. The act states that ‘[i]f the employee is injured by reason of his intentional and willful misconduct, he shall not receive compensation under the provisions of this act.’ . . .

To avoid confusion, the [1912] Legislature made it clear that by removing the employer’s defense in negligence, and easing recovery by employees, it was not making the employer liable for injuries employees wilfully inflicted on themselves.

The accident requirement assures that neither the employee nor the employer can use the workers’ compensation act as a means of benefiting from their own intentional misconduct.”²¹²

This *Daniel* case, involving a mental disability from the disciplinary action following the proven sexual harassment of female attorneys by a State employee, is a first for this Court. The majority of the Court of Appeals had no basis for saying that sexual harassment is excluded by the judicial construction of MCL 418.305,²¹³ when there has never been a judicial construction by this Court of § 305 involving sexual harassment.

Because of this *potpourri* of decisions that leaves the Court of Appeals and the administrative decision makers without clear guidance on this 90-year-old law, it is important to take “an approach [that] will maintain fidelity to the requirements set forth by the Legislature, while providing the lower courts [and administrative decision makers]

²¹² 427 Mich at 11-13; 398 NW2d at 887.

²¹³ 248 Mich App at 103-104; 638 NW2d at 180 (App 39a-40a).

with a clearer standard to follow . . . ,”²¹⁴ applying “the statutory language as best as possible as written.”²¹⁵

Going back to the intent of the 1912 Legislature concerning what is now MCL 418.305, the State demonstrates how right was the Commission’s finding that Mr. Daniel had engaged in intentional and willful misconduct, and that Mr. Daniel’s “injury” was “by reason of” his intentional and willful misconduct.²¹⁶

4. **Interpreting the facts as intended by the Legislature, Mr. Daniel’s “injury,” his temporary mental disability arising from the disciplinary consequences of his sexual harassment of female attorneys, was “by reason of his intentional and wilful misconduct.”**
- a. **Mr. Daniel’s sexual harassment of female attorneys was improper and wrongful conduct.**

The very nature of Mr. Daniel’s proven conduct makes it improper and wrongful. It was labeled “crude and unprofessional” by the Court of Appeals majority.²¹⁷ The Magistrate said that “[I]t is difficult to have much sympathy for this claimant, since he brought these troubles on himself by his own misconduct.”²¹⁸

However, that Mr. Daniel’s conduct was improper and wrongful is settled by the fact it was in violation of Civil Service Rules, in violation of Department of Corrections Rules, and was against public policy.

²¹⁴ *Nawrocki v Macomb County Road Commission*, 463 Mich 143, 150; 615 NW2d 702, 707 (2000).

²¹⁵ *Nawrocki*, 463 Mich at 171; 615 NW2d at 717.

²¹⁶ Commission p 6 (App 25a).

²¹⁷ 248 Mich App at 104; 638 NW2d at 180 (App 40a).

²¹⁸ Magistrate 12 (App 16a).

The Civil Service Commission has powers within its sphere of authority.²¹⁹

Sexual harassment is forbidden by the Michigan Civil Service Rules.

Section 1-2

"No Discrimination . . .

1-2-2 Sexual harassment.-

Sexual harassment is a form of discrimination that is expressly prohibited. No classified employee shall engage in or be subject to sexual harassment during the course of employment in the classified service."²²⁰

Sexual harassment is prohibited by the Department of Corrections.

The Department of Corrections Employee Handbook published in September of 1992 was in effect during the time Mr. Daniel sexually harassed the female attorneys.

The handbook said in pertinent part:

GENERAL INFORMATION AND GUIDELINES.

"Sexual harassment is a form of sex discrimination and is prohibited by state law, Civil Service rules and Department policy. Sexual harassment will not be tolerated. . . . "²²¹

IV. DEPARTMENTAL WORK RULES

"SEXUAL HARASSMENT . . .

Sexual harassment is unlawful and will not be tolerated. . . .

Employees . . . found guilty of sexual harassment will be subject to discipline up to and including dismissal. . . . "²²²

Sexual harassment is against public policy.²²³

MCL 37.2102(1). Nondiscrimination, . . . :

²¹⁹ *Council No. 11, AFSCME v Civil Service Commission*, 408 Mich 385, 408; 292 NW2d 442, 451 (1980).

²²⁰ Civil Service investigative guidelines relating to sexual harassment complaints are found in CSC Regulation No. 1.03.

²²¹ Pp 11-12.

²²² Pp 86-87.

²²³ "We note that, besides constitutions, statutes, and the common law, administrative rules and regulations, and rules of professional conduct may also constitute definitive indications of public policy." *Terrian v Zwit*, ___ Mich ___, ___ n 11; ___ NW2d ___, ___ n 11 (2002), July 25, 2002 (Docket No. 115924) (slip op 12, n 11)

"Sec. 102. (1) The . . . full and equal utilization of . . . public service . . . without discrimination because of . . . sex . . . is recognized and declared to be a civil right. . . ."

MCL 37.2103(i).

"Discrimination because of sex includes sexual harassment which means unwelcome . . . verbal . . . communication of a sexual nature when: . . .

(iii) Such . . . communication has the . . . effect of . . . creating an . . . offensive employment . . ."

29 CFR 1604.11(a).

"Harassment on the basis of sex is a violation of section 703 of title VII [42 USC § 2000e et seq]. Unwelcome sexual advances . . . and other verbal or physical contact of a sexual nature constitute sexual harassment when . . .

(3) such conduct has the . . . effect of creating an offensive working environment."

"The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome'."²²⁴

b. Mr. Daniel's sexual harassment of female attorneys was deliberate.

The very nature of Mr. Daniel's proven conduct could only have been deliberate. It was persistent and repeated, it was self motivated, it was not a thoughtless or a spur of the moment act. The Court of Appeals majority said it was "voluntary."²²⁵ The Magistrate said "he brought these troubles on himself by his own misconduct."²²⁶

c. Mr. Daniel's sexual harassment of female attorneys was more than serious.

Look at what was alleged and sustained. This was not just an isolated instance in which there may have been a misunderstanding. There were complaints by female attorneys of conduct that had extended over a period of time, two or three years, until

²²⁴ *Meritor Savings Bank v Vinson*, 477 US 57, 68; 106 SCt 2399, 2406; 91 LEd2d 49, 60 (1986).

²²⁵ 248 Mich App at 102, 104; 638 NW2d at 179, 180 (App 40a).

²²⁶ Magistrate 12 (App 16a).

finally, in frustration, the female attorneys reported Mr. Daniel's conduct to his supervisor.²²⁷

Several other factors contribute to the conclusion that Mr. Daniel's proven conduct was more than serious.

One factor is "visceral,"²²⁸ the reaction by a decision maker to Mr. Daniel's proven persistent words and conduct. "It is difficult to have much sympathy for this claimant, since he brought these troubles on himself by his own misconduct."²²⁹ "Justice cries out that a wrongdoer should not be able to profit from his wrongdoing"²³⁰

Another factor, as illustrated in the preceding subsection, is the universal condemnation of Mr. Daniel's proven conduct by law, rule, public policy, and court decisions.

A third factor is the fact that Mr. Daniel's proven conduct subjected him to a possible discharge from the Department of Corrections.²³¹

All of these factors add up to the conclusion that Mr. Daniel's proven deliberate, improper, and wrongful conduct was more than serious.

But this is not a factual decision for the Court of Appeals, it is a factual decision for the Magistrate, and for the Commission, with the Court of Appeals required to accept the Commission's factual determination²³² "in the absence of fraud."²³³

²²⁷ TR 404.

²²⁸ Magistrate 7 (App 11a).

²²⁹ Magistrate 12 (App 16a).

²³⁰ Commission 6 (App 25a).

²³¹ Pl exh 5.

²³² *Mudel v Great Atlantic and Pacific Tea Co*, 462 Mich 691, 697; 614 NW2d 607, 610 (2000).

²³³ Const 1963, art 6, § 28, MCL 418.861a(14).

As the Court of Appeals majority admits, the Commission found Mr. Daniel's proven conduct to be intentional and willful misconduct."²³⁴

The Commission was right on the facts, and the majority of the Court of Appeals acted beyond its authority in rejecting the Commission's conclusion.

d. But for Mr. Daniel's sexual harassment of female attorneys he would not have been "injured," he would not have suffered a temporary mental disability from the disciplinary consequences of his "intentional and willful misconduct."

One asks, for what other reason did Mr. Daniel receive his "injury," his temporary mental disability?

The Court of Appeals majority said that "[t]here is no question that plaintiff acted voluntarily, and that he was disciplined for his acts."²³⁵

The Court of Appeals majority also recognized that "the WCAC, in a two to one decision . . . [held] he should not receive compensation because his misconduct prompted the disciplinary proceedings that caused his injury."²³⁶ And, the majority of the Court of Appeals also recognized that the Commission had held, "because plaintiff's own alleged act triggered the discipline, MCL 418.305 precluded awarding him benefits."²³⁷

The Magistrate was "convinced that the discipline, and the attendant procedures, were employment acts which precipitated Plaintiff's decompensation."²³⁸

No matter which meaning is applied to "by reason of," it follows that Mr. Daniel's injury - his temporary mental disability arising from the allegations, the investigation, the hearings, the imposed discipline, and the subsequent unsuccessful

²³⁴ 248 Mich App at 100; 638 NW2d at 179 (App 38a).

²³⁵ 248 Mich App at 102; 638 NW2d at 179 (App 38a).

²³⁶ 248 Mich App at 100; 638 NW2d at 179 (App 36a).

²³⁷ 248 Mich App at 102; 638 NW2d at 179 (App 38a).

²³⁸ Magistrate 13 (App 17a)

grievance proceedings upholding the awarded discipline - was “by reason of” his intentional and willful misconduct.

“But for” Mr. Daniel’s intentional and willful misconduct, there would not have been the allegations, investigation, etc.

The allegations investigation, etc, were “because of,” or “on account of,” or “by nature of” Mr. Daniel’s intentional and willful misconduct.

What remains is to demonstrate the inapplicability of this Court’s *Calovecchi v State of Michigan*,²³⁹ handed down in 2000.

B. This court's opinion in *Calovecchi* relating to disciplinary action as a consequence of unproven charges is not relevant to this *Daniel* case relating to disciplinary action as a consequence of proven intentional and willful misconduct.

To begin with, *Calovecchi* had absolutely nothing to do with MCL 418.305.

Despite the majority’s claim to the contrary, *Calovecchi* does not have any relevance to this *Daniel* case.

This is how the majority found relevance between *Calovecchi* and *Daniel*:

“Under the WCAC’s reasoning, a juxtaposition of these two cases would mean that when a plaintiff has suffered a mental injury because of an employer’s disciplinary proceedings, if the charges are dismissed the worker may collect compensation. If they are not, the worker is denied compensation because of wilful misconduct.”²⁴⁰

The majority could only have come up with this argument by ignoring the fact that no negligent acts of an employee are included within the terminology “intentional

²³⁹ 461 Mich 616; 611 NW2d 300 (2000).

²⁴⁰ 248 Mich App at 105; 638 NW2d at 181 (App 41a).

and wilful misconduct,” and by ignoring the fact that the Legislative intent, as expressed by the words of MCL 418.305, and its British origins, require that for there to be a violation of MCL 418.305, there must be proof;

1. the conduct was improper or wrongful,
 2. the conduct was deliberate [not a thoughtless spur of the moment act],
 3. the degree of conduct [not the consequences] was more than serious,
- and
4. but for the “intentional and willful misconduct” the employee would not have been injured [or the employee’s injury was by nature of, or on account of, or because of, the employee’s intentional and willful misconduct].

The Court of Appeals majority’s decision was wrong on the facts and on the law.

The Commission's decision was correct.

Mr. Daniel “shall not receive compensation under the provisions of” the Workers' Disability Compensation Act.

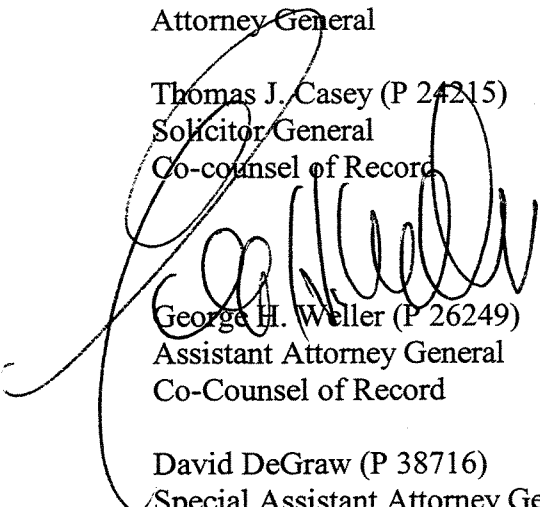
RELIEF

The decision of the majority of the Court of Appeals panel, that reversed the Workers' Compensation Appellate Commission's denial of benefits to Tony J. Daniel, should be reversed.

Respectfully submitted,

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